



In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1808

GENERAL INSURANCE COMPANY OF AMERICA,
Petitioner,

VERSUS

OKLAHOMA CITY HOUSING AUTHORITY,
Respondent.

**BRIEF IN OPPOSITION
TO
PETITION FOR CERTIORARI**

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TABLE OF CONTENTS

	PAGE
Questions Presented	1
Statutory Provisions Involved	2
Statement of the Case	2
Consideration Governing Review on Certiorari	4
Argument	5
I. There Are No Conflicting District Court Judgments Involving Petitioner	5
II. Jurisdiction of a Federal Bankruptcy Court, and Conflicts as Between the Courts of Appeals	7
III. Amendment to Pleadings and Due Process	11
Schedule of Proceedings, Stays, and Continuances	12
IV. Applicable Oklahoma Law	13
A. Liquidated Damages	13
B. The Element of Fraud	14
C. Attorney's Fees	14
Conclusion	16
Certificate of Mailing follows Brief.	

TABLE OF AUTHORITIES

CASES:

Consolidated Flour Mills Co. v. File Brothers Wholesale Grocery (10 Cir., Okl.), 110 F.2d 926....	13
Flour Mills of America, Inc. v. American Steel Building Co. (Okl.), 449 P.2d 861	13
Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702	14-15

AUTHORITIES CONTINUED	PAGE
Jeter v. DeGraff (Okl.), 219 Pac. 345	9, 13
Knapp v. Ottinger, 240 P.2d 1083	13
Macri v. United States, 353 F.2d 804	16
Mason v. Continental Supply Company, 99 Okl. 32, 225 Pac. 381	13
Mercantile-Commerce Bank & Trust Co. v. South- east Arkansas Levee District (C.A. Ark.), 106 F.2d 966	16
Smyth v. United States, 302 U.S. 329	9
State ex rel. Oklahoma Bar Association v. O'Bryan, 385 P.2d 876	10
United Forests Products Co. v. Baxter (C.A. 8), 452 F.2d 11	10
STATUTES:	
15 O.S. § 215	13
RULES:	
Fed. Rules Civ. Proc., Rule 15(b)	11
U.S. Sup.Ct. Rule 19 1(b)	4
TEXTBOOKS:	
17 C.J.S., Contracts, § 167	9
Moore's Federal Practice, Vol. III, § 15.13[2], pages 1011-1012	11
Restatement of Contracts, Sec. 479	14
Restatement of Torts 2nd, § 549	9-10
Williston on Contracts, 3rd Ed., § 1515	14
Williston on Contracts, 3rd Ed., § 1523	10
Williston on Contracts, 3rd Ed., § 1524	10
MISCELLANEOUS:	
General Conditions of the Contract (Retainage), § 12, page 10 of 46	7-8

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QUESTIONS PRESENTED

Respondent cannot agree that "Questions Presented" appearing on pages 2 and 3 of the Petition for Writ of Certiorari are in fact at issue:

1. There are no "contract balances" involved, and therefore no property of the bankrupt was or is in dispute.
2. In the proceedings which are the subject of this Petition, the liability of the bankrupt was not determined, only the liability of the bankrupt's performance bond surety.
3. The credit to which a surety might be entitled for work performed by its principal is not established, and, indeed, under applicable law, no such credit exists.

4. Petitioner was granted ample opportunity to prepare its defense, as will more fully appear.

5. Question 5 appears fairly presented.

STATUTORY PROVISIONS INVOLVED

Respondent has no argument with the quotations from the United States Constitution, the Bankruptcy Act and Rules, the Federal Rules of Civil Procedure, or the Oklahoma Statutes appearing in pages 3 and 4 of the Petition; their application to the controversy here is difficult to conceive.

STATEMENT OF THE CASE

Cognizant of the provisions of U.S. Sup.Ct. Rule 40 3, Respondent feels compelled to provide the Court with an accurate summary of the controversy:

Globe Construction Company, Petitioner's performance-bonded principal, was awarded the prime contract for remodeling of the Oklahoma City Housing Authority's Will Rogers Courts public housing project in Oklahoma City, Oklahoma, under contract dated October 25, 1972. Work was to be completed within 180 days. Pursuant to contractual proviso, the Authority terminated the construction contract effective September 19, 1973, for failure of the contractor to perform according to the contract terms, as will be particularized in argument which follows.

Globe invoked the diversity jurisdiction of the Western District of Oklahoma, the Honorable Stephen S. Chandler presiding, as against the Authority for wrongful termina-

tion of the contract, for extra work and materials it allegedly provided and performed outside the scope of the contract, and as against its subcontractors for failure of performance on their part. The contractor's surety, petitioner here, was made a party to the action on its performance bond, and was represented by counsel for Globe until substitute counsel was retained following several days of trial, and during a period of continuance.

During the course of the proceedings, Globe filed for relief under Chapter XI of the Bankruptcy Act, following which the proceedings were conducted as against the surety only (petitioner here) in view of stay provisions and orders issued by the District Court for the District of Colorado pursuant to plenary jurisdiction.

Judgment rendered against the bankrupt after the filing of the Chapter XI proceedings was subsequently, by agreement of the parties, released, and is not at issue here. In addition, judgment rendered on June 6, 1978, as against the contractor for punitive damages arising from the contractor's fraud is the subject of an appeal pending in the United States Court of Appeals for the 10th Circuit, and again, is not at issue here.

In exhaustive Findings of Fact and Conclusions of Law, the trial court found, *inter alia*, that Globe fraudulently induced the Authority to execute the construction contract, and that it breached the construction contract in fifteen particulars. Accordingly, judgment was rendered against the surety and in favor of the Authority for liquidated damages as provided in the construction contract, the court specifically finding that assessment of actual

damages was extremely difficult, and that the liquidated damages assessed were not on the face of the contract disproportionate to probable loss. Costs of the action, including reasonable attorney's fees, after hearing as to amount, were taxed against General.

Petitioner sought rehearing in the Court of Appeals, the same having been denied on March 23, 1978.

CONSIDERATION GOVERNING REVIEW ON CERTIORARI

U.S. Sup.Ct. Rule 19 1(b) suggests the criteria considered by the Court in determining whether it will exercise its discretionary power to grant a Petition for Writ of Certiorari. Petitioner apparently seeks to invoke that portion of Rule 19 which relates to conflicts between courts of appeal on the same matters; respondent respectfully invites the Court's attention to the opinion of the United States Court of Appeals for the 10th Circuit, page 1 of the Appendix to Petitioner's Brief, and particularly to the following:

"Many of the matters raised by General Insurance on appeal concern what we deem to be questions of fact which were resolved by the trial judge on the basis of conflicting evidence. For example, such matters as fraud in the inducement; waiver of such fraud; latent conditions, defective plans, timely performance; substantial performance; waiver of any right to terminate; reasonable attorney's fees are in reality factual issues, not legal issues. It is of course axiomatic that resolution by a trial judge of controverted issues of fact are not to be overturned by an appellate court unless they are clearly erroneous. In the instant case the trial judge's critical findings of fact are not, in our

view, clearly erroneous. On the contrary, the court's findings are supported by the record and accordingly on appeal must be accepted."

The issues presented here involve merely a dispute with regard to contractual obligations, responsibilities, and performances of the parties. Resolution of such issues by the trier of facts does not constitute either special or important reasons for consideration by this Court.

ARGUMENT

I.

THERE ARE NO CONFLICTING DISTRICT COURT JUDGMENTS INVOLVING PETITIONER

In its enthusiasm to attain review, petitioner urges upon the Court a conflict between four judgments rendered by two different courts upon "identical issues of law and fact." To clarify, the judgments referred to are as follows:

1. Judgment rendered October 3, 1974, in favor of Respondent, Oklahoma City Housing Authority and against the contractor Globe Construction Company, subsequently released by agreement of the parties and not at issue here.
2. Judgment rendered in favor of Respondent, Oklahoma City Housing Authority and against the contractor's surety, Petitioner here, on April 30, 1975, the subject of an appeal to the United States Court of Appeals to the 10th Circuit, affirmed January 13, 1978, rehearing denied, March 23, 1978, which is the only judgment concerning which petitioner seeks review.

3. Judgment rendered June 6, 1978, in favor of the Oklahoma City Housing Authority and against Globe itself, for punitive damages resulting from Globe's fraud, concerning which petitioner, as the performance bond surety, has no liability and in which, it is assumed, it has no interest. This judgment is, in any event, the subject of a pending appeal to the United States Court of Appeals for the 10th Circuit.
4. Judgment rendered by the Bankruptcy Court on August 11, 1975, disallowing the claim of the Oklahoma City Housing Authority as against the bankrupt, Globe Construction Company, without reference to any claim respondent had or might have as against petitioner, Globe's performance bond surety.

There is no conflict involved here between the decisions of the district courts including the Bankruptcy Court, hereinabove referred to.

II.

JURISDICTION OF A FEDERAL BANKRUPTCY COURT, AND CONFLICTS AS BETWEEN THE COURTS OF APPEALS

Petitioner, citing Remington on Bankruptcy and Collier on Bankruptcy suggests this Court should accept jurisdiction of this issue because of an inconsistency with regard to jurisdiction of a bankruptcy court over property actually in the possession of the bankrupt, or whether such jurisdiction extends to the property of a bankrupt in the hands of third parties. But this controversy, assuming such a controversy exists, has no application to the case at bar. Petitioner appears to rely upon payment by the Authority to the contractor of periodic completion estimates provided by the contractor to indicate the work in question, had, at the time of termination, been 90% completed. It says, in effect, that since the contractor had completed its work and the Authority had retained 10% of the over-all contract price, that 10% figure (\$195,000.00) was the property of the contractor and therefore subject to the jurisdiction of the Bankruptcy Court upon the filing for Chapter XI relief. General's argument is defectively and deceptively spurious, for it assumes factually that Globe had, at the time it was terminated, completed almost 100% of its contractual obligation, and more importantly, that a defrauding contractor may, as a matter of law, nevertheless recover the benefit of his bargain, specifically, his profit under the terms of the fraud-tinged agreement. "Retainage" is provided in § 12, page 10 of 46, General Conditions of the Contract in suit. It provides, in pertinent part that:

"In order to receive partial payments the Contractor shall submit periodical estimates showing the value of

the work performed monthly, based upon the items in the approved breakdown. *Such estimates are subject to correction and revision as required.* In making such partial payments for the work there shall be retained 10% of the estimate until final completion and acceptance of all such work covered by the Contract . . .

"Upon completion and acceptance by the Local Authority of all work required hereunder, the amount due the Contractor shall be paid after the Contractor has furnished to the Local Authority a release in satisfactory form. . . ." (Emphasis supplied)

As we can see, General's \$195,000.00 figure is based upon estimates of completion prepared by Globe. The evidence is that substantial work had to be re-done, and the record amply demonstrates the contractor's failure to perform in areas too numerous to detail; the trial court's Memorandum Opinion, and the record supporting it lead any logical mind to the inescapable conclusion that Globe failed to perform the contract according to its terms; it did not provide adequate supervision for the completion of the construction project, including the crucial coordination of various subcontracting crafts, it did not provide temporary heat to prevent injury from dampness or cold, it was not familiar with conditions on the job site, it did not complete the work it did attempt in a good and workmanlike manner, it did not provide protection of the work which was open or exposed, and it did not protect the Authority's property from injury or loss during the course of the construction; in short, it did not perform its half of the bargain, and therefore, it did not earn performance of the other half, that is, payment.

This "retainage" did not, as General asserts, belong to Globe, nor was the work "completed" or adjudged by the architect to be satisfactory. Indeed, the underlying purpose for retainage is the guaranty of satisfactory completion of the work.

By no stretch of the imagination can such unearned "retainage" be considered as the property of a debtor in bankruptcy, and any conflict between Messrs. Remington and Collier, whether real or imagined, has no bearing, for there was, in fact, no property of the bankrupt to be considered.

Understandably, petitioner ignores the effect of the perpetration of fraud upon the duties, rights, and responsibilities of the parties. As this Court said in *Smyth v. United States*, 302 U.S. 329, 358, "Fraud vitiates every form of conduct affected by its taint.", and in Oklahoma, fraud constitutes a complete defense to an action on a contract tainted by the fraud of the moving party. And the defrauded party may retain the benefit it has received and recover damages by reason of the fraudulent misrepresentation of the fraudor. *Jeter v. DeGraff* (Okl.), 219 Pac. 345; 17 C.J.S., *Contracts*, § 167.

The Authority's entitlement to damages finds support at § 549, Restatement of Torts 2nd, where the measure of damages available to a defrauded contractee is discussed:

"(1) The recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including

- (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
 - (b) Pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation.
- (2) The recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract with the maker if these damages are proved with reasonable certainty."

The issue is discussed at Williston on Contracts, 3rd Edition, § 1524, as follows:

"The right of one who has suffered damages by fraudulent representations to bring an action for deceit hardly requires any citation of authorities. In order to maintain such an action where benefit has been received by the plaintiff, it is not necessary that such benefit be returned. The defrauded party may retain this benefit and sue for the damages he has suffered."

See also, Williston on Contracts, 3rd Edition, § 1523; *United Forests Products Co. v. Baxter* (C.A. 8), 452 F.2d 11. In Oklahoma specifically "Fraud will vitiate any contract procured thereby." *State ex rel. Oklahoma Bar Association v. O'Bryan*, 385 P.2d 876.

III.

AMENDMENT TO PLEADINGS AND DUE PROCESS

Petitioner asserts the trial court, permitting respondent to amend its counterclaim at time of trial, denied it due process because due process requires prior notice of all claims and an opportunity to present a defense. While present counsel for General was not a participant at trial, a cursory review of the record discloses that General and Globe were repeatedly offered the opportunity to proffer evidence on the fraud issue, receiving 48 days in continuances in order to foreclose any possible indicia of unfairness or disadvantage. Petitioner's innuendo that federal district courts are interpreting Rule 15(b) F.R.C.P. in a manner violative of due process finds no support in these proceedings. Clearly the allowance of amendments to pleadings in conformity with proof adduced should be generously exercised. Amendments to pleadings should be allowed and continuances granted in order to avoid disadvantageous surprise, Volume III, Moore's Federal Practice, § 15.13[2], pages 1011-1012, precisely the procedure followed by the district court. Respondent's request for leave to amend was made in opening statement on July 30, 1974; not until April 30, 1975, almost nine months later, was judgment rendered against General. Petitioner's assertion that due process was denied in rendition of the default judgment against Globe on October 4, 1974, might readily be considered a rather transparent attempt at obfuscation, for that judgment has been released and is without relevance here. Schedule of proceedings, stays, and continuances considered by the Court of Appeals in consideration of the due process issue is as follows:

SCHEDULE OF PROCEEDINGS, STAYS, AND CONTINUANCES

PROCEEDINGS	CONTINUANCES	EXPLANATION
July 30, 31 - August 1, 2, 1974	Originally to August 20, 1974 (18 days)	Request of Appellant, to allow time for preparation to meet the issue of fraudulent inducement.
October 1, 2, 3, 4 & 7, 1974	Then to October 1, 1974 (30 days) To November 18, 1974 (42 days)	By agreement of counsel, to allow Appellant's new counsel full opportunity to prepare. By agreement of counsel
November 18 & 25, 1974	To December 4, 1974 (16 days)	On Petition for Writ of Prohibition and Mandamus, the Court of Appeals stayed the proceedings until further Order in view of bankruptcy proceeding by the prime contractor. On December 4, 1974, the stay was modified to allow the parties to proceed against the Appellant-Surety. Then on January 31, 1975, it was dissolved.
February 3, 4, 5, 6, 7, 10, 12, 1975	To February 3, 1975 (62 days) TOTAL CONTINUANCES TO FEBRUARY 3, 1975—168 DAYS	Conflicting schedules of Court and Counsel Completed

—12—

—13—

It can thus be readily seen that the trial court and counsel exercised extreme caution to insure no disadvantage would result to petitioner by the permitted amendment.

IV.

APPLICABLE OKLAHOMA LAW

A. LIQUIDATED DAMAGES

As we have seen, Restatement of Torts, Williston on Contracts, supra, a defrauded contractor may recover damages under the contract without restoration of any benefits received thereunder. And both General and Globe failed to prove or offer proof of any such benefit accrued. Cases like *Mason v. Continental Supply Company*, 99 Okl. 32, 225 Pac. 381, do not apply because the element of fraud so pervasive here, is notably absent there. Liquidated damages are clearly recoverable under Oklahoma law where provided by contract. 15 O.S. § 215, *Consolidated Flour Mills Co. v. File Brothers Wholesale Grocery* (10 Cir., Okl.), 110 F.2d 926; *Knapp v. Ottinger*, 240 P.2d 1083; *Flour Mills of America, Inc. v. American Steel Building Co.* (Okl.), 449 P.2d 861. And see *Jeter v. DeGraff* (Okl.), 219 Pac. 345.

And the contract provision under which the district court awarded liquidated damages provides for their calculation to the date of the completion of the work:

" . . . if the contractor fails to complete the work within the time specified . . . then the contractor shall pay to the Local Authority as fixed, agreed and liquidated damages (it being impossible to determine the actual damages occasioned by the delay) for each calendar day of delay, until the work is completed. . . ." (Emphasis added).

B. THE ELEMENT OF FRAUD

Petitioner complains that respondent's claim for fraud must fail because of absence of positive proof it relied upon Globe's fraudulent misrepresentations. The assertion is adequately answered at Section 479 from Restatement of Contracts, where the authors of that treatise state:

"Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing to the contrary that it was induced by the fraud or misrepresentation."

See also Williston on Contracts, 3rd Edition, § 1515, to the following effect:

"Where misrepresentations have been made in regard to a material matter and action has been taken, in the absence of evidence showing to the contrary, it will be presumed that the representations were relied on."

C. ATTORNEY'S FEES

This Court held in *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702, reciting an exception to the usual "American rule" regarding award of attorney's fees that:

"[1, 2] Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice may so require. Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation,' *Sprague v Ticonic National Bank*, 307 US 161, 166, 83 L Ed 1184,

59 S Ct 777 (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery.' *Mills v Electric Auto-Lite Co.*, 396 US 375, 391-392, 24 L Ed 2d 593, 90 S Ct 616 (1970); see *Fleishmann Distilling Corp. v Maier Brewing Co.*, 386 US 714, 718, 18 L Ed 2d 475, 87 S Ct 1404 (1967).

"[3] Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.' 6 J. Moore, *Federal Practice* ¶54.77[2], p 1709 (2d ed 1972); see, e. g., *Newman v Piggie Park Enterprises, Inc.*, 390 US 400, 402 n 4, 19 L Ed 2d 1263, 88 S Ct 964 (1968); *Vaughan v Atkinson*, 369 US 527, 8 L Ed 2d 88, 82 S Ct 997 (1962); *Bell v School Bd. of Powhatan County*, 321 F2d 494 (CA4 1963); *Rolax v Atlantic Coast Line R. Co.* 186 F2d 473 (CA4 1951). In this class of cases, the underlying rationale of 'fee shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant."

Application of this bad faith-oppressive exception to the traditional American Rule to the litigation at bar can be readily sustained, for the conduct of Globe in obtaining award of the contract by colluding to increase the bids of others, by fraudulently inducing the Authority to execute the contract, by its prosecution of the work involved, and by its and General's conduct of the litigation would appear to fall directly within the context referred to by the Supreme Court.

And, as Mr. Justice Brennan wrote, an award of attorneys' fees rests within the sound discretion of the trial

court and such an award should not be disturbed except in the case of an abuse of that discretion. *Mercantile-Commerce Bank & Trust Co. v. Southeast Arkansas Levee District* (C.A. Ark.), 106 F.2d 966; *Macri v. United States*, 353 F.2d 804.

CONCLUSION

The District Court resolved factual issues, based upon disputed facts and following Oklahoma law, in favor of Respondent. That judgment received extensive review and was affirmed by the Court of Appeals. It should remain undisturbed.

Respectfully submitted,

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July, 1978

CERTIFICATE OF MAILING

This is to verify that a true and correct copy of the above and foregoing Brief in Opposition to Petition for Certiorari was mailed this _____ day of July, 1978, to Judson S. Woodruff, Esq., and John N. Hermes, Attorneys-at-Law, 100 Park Avenue Building, Oklahoma City, Okla. 73102.

William B. Rogers